

AWARD

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NASD REGULATION, INC.

In the Matter of the Arbitration Between

Name of Claimants

John J. & Theresa T. Kavorkian

vs.

Case No.
9544247

Name of Respondents

*PaineWebber, Inc.
Robert Thomas Securities, Inc.
Thomas Anthony Arpante
Nathan & Lewis Securities Inc.

REPRESENTATION

For Claimants, John J. Kavorkian and Theresa T. Kavorkian ("Claimants"), David E. Shellenberger, Esq., and Andrea Manning, Esq., located in Boston, Massachusetts.

For Respondent, Thomas Anthony Arpante ("Arpante"), Christopher E. Mullady, Esq. and Jeffrey S. Raphaelson, Esq., from the firm of Raphaelson & Mullady, located in Boston, Massachusetts.

The Claim against PaineWebber, Inc., Robert Thomas Securities and Nathan & Lewis Securities, Inc. were dismissed due to settlement.

CASE INFORMATION

Statement of Claim was filed on September 1, 1995.

Claimants' Submission Agreement was signed on September 1, 1995.

Amended Statement of Claim was filed on April 1, 1996.

Notice of Dismissal of PaineWebber Inc., Nathan & Lewis Securities, Inc. and Robert Thomas Securities, Inc. was filed by Claimants on June 28, 1996.

Statement of Answer was filed by Respondent Robert Thomas on November 14, 1995.

Robert Thomas' Submission Agreement was signed on November 4, 1995.

Statement of Answer was filed by Respondent Arpante on August 8, 1996.

Arpante's Submission Agreement was signed on August 8, 1996.

Statement of Answer was filed by Nathan & Lewis on December 22, 1995.

Nathan & Lewis' Submission Agreement was signed on April 26, 1996.

PaineWebber, Inc. Statement of Answer was filed on November 10, 1995.

PaineWebber's Amended Statement of Answer was filed on April 22, 1996.

PaineWebber's Submission Agreement was signed on November 10, 1995.

HEARING INFORMATION

Hearing Dates/Sessions: August 1, 1996 - 2 sessions
August 2, 1996 - 2 sessions

Hearing Location: NASD Regulation, located at 260 Franklin Street, Boston, Massachusetts.

CASE SUMMARY

In their Statement of Claim, and Amendment to Statement of Claim, Claimants allege that they incurred losses because of misconduct by Respondents in the handling of their accounts, including forgery, fraud, churning and twisting, failure to disclose Respondent Arpante's record and misconduct, and reckless retention in hiring of Respondent Arpante. Claimants allege that Respondents are liable for Claimants' losses because of violation of Anti-fraud provisions of Massachusetts and Florida law, breach of contract, breach of fiduciary duty and negligence. Claimants allege also that Respondent Arpante effect4 forgeries and engaged in misrepresentations in the handling of investments and life insurance annuity contracts for Claimants.

In his answer, Respondent Arpante states that he acted with the authorization of the Claimants and did not engage in concealment from Claimants or twisting of Claimants' investments in annuities. Respondent Arpante also denies alleged assurances given to Claimants regarding their assets or income, or that he misled Claimants, or that Claimants' account at PaineWebber, Inc. was churned. Respondent Arpante also raises as defenses that the claims relate to annuity and insurance transactions and are not eligible for arbitration, failure to state a claim, acquiescence, ratification, estoppel and waiver, eligibility of any claims prior to September 1, 1989, statute of limitations, laches, failure to mitigate, and that Claimants have been whole by a settlement with other Respondents.

In its answer, Respondent PaineWebber, Inc. asserts that the claim is untimely as being ineligible and that Respondent PaineWebber, Inc. cannot be held responsible for any loss by Claimants. In their Answer, Respondent Robert Thomas Securities, Inc., denies the allegations of Claimants and that Claimants lost any money as a result of securities transactions through Respondent Robert Thomas Securities, Inc., Respondent Nathan & Lewis Securities, Inc., filed an Answer denying the allegations of Claimants.

RELIEF REQUESTED

Claimants seek to have the balance of their original principal of \$160,000 restored plus the shortfall of income of \$15,000 per year allegedly assured them by Respondent Arpante, punitive damages of \$100,000, plus interest, costs and attorney's fees.

Respondent Arpante requests an award in his favor and costs of the arbitration. Respondent Arpante also made motions to bar all claims as ineligible, that all claims related to transactions prior to September 1, 1989 should not be considered, and to dismiss the claims based on a three-year statute of limitations. Respondent Arpante also reserved his right to contest any power on the part of the panel to make any determinations on questions of eligibility, arbitrability or the scope of the arbitrators' powers. Respondents PaineWebber, Inc., and Robert Thomas Securities, inc., request that the claims against them be dismissed and that they be allowed costs of arbitration.

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OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies and have agreed to receive conformed copies of the Award while the original remains on file with the NASD Regulation.

Claimants dismissed their claims against Respondents PaineWebber, Inc., Nathan & Lewis Securities, Inc. and Robert Thomas Securities, Inc., because Claimants entered into a settlement with those Respondents.

Claimants made a motion to bar Respondent Arpante from presenting any matter, arguments or defenses at the hearing based on a late filing of answer by Respondent Arpante. After considering the materials furnished, the Panel denied this motion. Under the circumstances, including the discovery and exchange of documents which occurred and the fact that Claimants settled with all other Respondents, the Panel does not believe there is material prejudice to Claimants by permitting Respondent Arpante to present his defense at the hearings. The Panel also took into account the fact that there was a misunderstanding as to whether Respondent Robert Thomas Securities, Inc. (which has settled with Claimants) was handling Respondent Arpante's defense.

Respondent Arpante filed a request to file a late answer and counterclaim dated July 17, 1996. After considering the materials furnished, the panel granted the request by Respondent Arpante to file an answer, but barred Respondent Arpante from filing a counterclaim. For many of the reasons cited above, the panel believes, under the circumstances, that Respondent Arpante should be permitted to file an answer. However, Respondent Arpante's counterclaim raises collateral issues, including libel claims against Claimants, which the panel does not believe Respondent Arpante should be permitted to raise on the eve of the hearings.

Respondent Arpante filed a Motion for Continuance of the hearings scheduled for August 1 and August 2, 1996, which Motion was dated July 24, 1996. After considering the materials furnished, the panel denied the Motion for Continuance. The panel does not believe that Respondent Arpante showed good cause to have a continuance. At the time of his motion, Respondent Arpante had been aware of the claim for many months, had counsel for over three months and the hearing date had been set for almost two months. The panel believed that Respondent Arpante would not be prejudiced in presenting his case at the originally scheduled hearing dates because a good deal of discovery and production of documents had occurred. By the same token, the panel believes that Claimants may have been prejudiced by any delay in the hearing dates.

At the hearings, the panel granted the request of Claimants that Suzanne Arpante, wife of Respondent Arpante, and a possible fact witness, be sequestered.

Respondent Arpante moved that the claims of Claimants be limited to those which are based on transactions which occurred after August 31, 1989, the Statement of Claim in this case being dated September 1, 1995. After oral argument and in light of the provisions of Section 15 of the *NASD Code of Arbitration Procedure* ("Code"), the motion was granted and the panel did not consider claims in this arbitration based on transactions which occurred prior to September 1, 1989.

Respondent Arpante moved to bar all claims of Claimants as being ineligible under Sections 1 and 12 of the *NASD Code*. After oral arguments, the panel took the motion under advisement. After considering the material furnished to the panel, the oral arguments of the parties and the arguments of the parties in

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their post-hearing briefs, the panel denies the motion to bar claims. In connection with this motion, Respondent Arpante questioned the authority of the arbitrators to determine questions of **arbitrability**. On this threshold issue, the panel decides that it does have the power to determine whether the dispute is subject to arbitration under Sections 1 and 12 in this case.

First, the parties signed Submission Agreements agreeing to arbitration in accordance with NASD Rules and *Code*. The panel also relies on Section 35 of the NASD *Code*, which provides that the arbitrators **shall** be empowered to interpret and determine the applicability of **all** provisions under the *Code* and that such interpretations and actions **shall** be final and binding upon the parties. In addition, there is a presumption of arbitrability in that the right to arbitrate a claim should not be denied unless it may be said with positive assurance that the applicable arbitration provision is not susceptible of an interpretation that covers the dispute. *PaineWebber, Inc. v. Hofmann*, 984 F2d 1372, 1377 (3d Cir. 1993). For the reasons set forth below, there is no such positive assurance in this case.

Respondent Arpante argues that the claims are ineligible for submission to arbitration under Section 1 of the *Code* because they were effected through insurance agencies and do not arise out of or in connection with the business of a NASD member, thus calling into play the language in Section 1 excepting disputes involving the insurance business of any member which is also an insurance company. Although Respondent Arpante concedes that the challenged insurance and annuity transactions did touch upon the business of NASD members Nathan & Lewis Securities, Inc. and Robert Thomas Securities, Inc., he argues the transactions did not arise out of or in connection with the business of those firms but rather the business of various non-member insurance firms. Claimants argue that the intent of Section 1 is to bar insurance-only claims against insurance companies and that to the extent Claimants' annuity transactions involved insurance companies, the case relates not to the insurance companies or their businesses but rather to Respondent Arpante and actions which he carried out as an employee or associate of Robert Thomas Securities, Inc., and Nathan & Lewis Securities, Inc. As such, Claimants argue, Respondent Arpante is an "associated person" under Section 12(a).

The panel decides that the claims in this case are eligible to be arbitrated under Sections 1 and 12 of the *Code* because in essence the transactions in question are not only insurance transactions but transactions which involve the brokerage accounts of Claimants with NASD members and the actions of an "associated person" under Section 12(a). In particular, the exception for "disputes involving the insurance business of any member who is also an insurance company" under Section 1 does not apply in this case, because the insurance business in question was not that of any member which is also an insurance company. Rather the transactions involved NASD members and an associated person, but not just the insurance business of any such member.

Respondent Arpante moved to dismiss the claims of Claimants based on the Massachusetts three-year statute of limitations involving tort actions. This motion was taken under advisement by the panel. After considering the material furnished and oral and written arguments of the parties, the panel denies the motion to dismiss the claims. The panel believes that the Massachusetts discovery rule applies to this case. The possible improper actions of Respondent Arpante were not discovered by Claimants until January 1995 at the earliest. Here the claim was commenced in September 1995, well within the three years, to the extent the Massachusetts statute is in fact applicable.

The panel granted the request of the parties present at the hearings to file post-hearing briefs after the last hearing day of August 2, 1996. The date for completion of filing of all briefs was August 27, 1996, whereupon the record was closed, except for the issuance of this award.

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The panel makes the following observations, not for the purposes of expressing findings of fact or legal conclusions, but in order to explain key elements of the rationale behind the award.

Respondent Arpante engaged in misrepresentations in handling the investments and funds of Claimants, including life insurance annuities and other investments. These included overstating the value of immediate or depleting annuities held by Claimants in periodic reports given to Claimants; not properly disclosing to Claimants the penalties, cancellation charges or surrender charges which would be incurred in switching to new annuities and the impact of those charges on the value of the assets of Claimants'; claiming that the rating of a Xerox annuity was questionable in presenting a reason for switching from the Xerox annuity; not properly disclosing that it was not necessary for Claimants to switch annuities in connection with changes by Respondent Arpante in his affiliation with brokerage houses; not properly disclosing to Claimants the impact on the value of their principal of various withdrawals of principal and depletion of principal through payments of immediate or depleting annuities; and in misrepresenting the amount of income achievable by Claimants from their assets without impairing principal.

Respondent Arpante stood in a fiduciary relationship to Claimants because he held himself out as a financial consultant and Claimants consulted and relied upon Respondent Arpante on almost all of their financial matters and decisions for almost 10 years. Respondent Arpante also engaged in unauthorized trading of at least one security and some of the annuity transfers were done without approval. Respondent Arpante's misrepresentations (reasonably relied upon in most instances by Claimants because of the fiduciary relationship with Respondent Arpante) and unauthorized actions led, in part, to losses to Claimants of approximately \$80,000, with respect to actions which occurred within the six-year eligibility period, on which amount Claimants were unable to earn income.

However, the panel, in making the award in this case, took into account the fact that Claimants received gross settlement proceeds of \$75,000 from the three Respondents who settled with Claimants, which is a material contribution to making Claimants whole. In addition, Claimants were partially responsible for the losses they suffered. Claimants received statements and correspondence from the various insurers who issued annuities, written updates from Respondent Arpante, the contents of some of which should have led Claimants to initiate more inquiries than they did. Claimants knew that some of their principal was being depleted. Although Claimants did raise some questions with Respondent Arpante and received some assurances from him, not all of their reliance on his assurances was reasonable. The panel also took into account that Respondent Arpante did not misappropriate any funds from Claimants and, relatively speaking, benefitted very little (some commissions on the issuance of annuities) on the transactions at issue. In addition, Claimants understood that in certain cases Respondent Arpante was or may have been signing documents for them. Thus, the panel does not believe that most of these signatures were, strictly speaking, forgeries, as claimed by Claimants.

Finally, the arbitrators took into account that this is not a case where the majority of the losses occurred due to decreases in value of investments. Rather, most of the losses occurred because Claimants drew down principal, as opposed to income, which, to some extent, they did not realize. Accordingly, the panel took into account the fact that the Claimants received some benefit from the receipt of funds from principal, such as, for example, the purchase of a van, withdrawal of funds to lend to their son and money used for living expenses.

Although the arbitrators believe that they have the authority to award punitive damages in this case, they decline to do so, because on balance and under all of the circumstances, the conduct of Respondent

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Arpante was not so egregious, reprehensible and outrageous as to justify an award of punitive damages in this case.

Also, the arbitrators decline to award attorney's fees as requested by Claimants. Claimants did not show a statutory or contractual basis to justify an award of attorney's fees, even though the arbitrators would have the power to do so, had such a basis for an award of attorney's fees been shown. The panel notes that the Massachusetts Securities Act (M.G.L., Ch. 110A Sections 101), although it authorizes reasonable attorney's fees to customers prevailing in securities disputes, defines investments under the Act to exclude annuity contracts (Sections 401(k)). The arbitrators also do not believe that sufficient contact with the State of Florida was shown to justify application of Florida law in this case.

After considering the pleadings, testimony and evidence presented at the hearings and the submissions of the parties, the undersigned arbitrator has decided in full and fair resolution of the issues submitted for determination as follows:

1. Respondent Thomas Arpante is hereby liable to Claimants in the amount of Twenty-Five Thousand Dollars and 00/100 cents (\$25,000.00).
2. Respondent Thomas Arpante is further liable to Claimants for interest at the rate of eight percent (8%) per annum on the total award from January 1, 1995, to the date of this award, and twelve percent (12%) per annum on the total award from the date of this award to the payment of this award.
3. All other claims, including claims for punitive damages, attorney's fees and costs are denied.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following Forum Fees are assessed against Respondent Arpante.

Non-refundable Filing Fee:	\$200.00
Hearing Session Deposit:	\$3,000.00 (4 sessions @ \$750.00 per session)
Total Fees:	\$3,200.00

1. Claimants previously deposited \$950.00 and are entitled to a refund in that amount.
2. Respondent Arpante shall satisfy the fees by reimbursing Claimants \$950.00 and by remitting \$2,250.00 to the NASD Regulation. Respondent deposited \$750.00 with NASD Regulation and shall remit to NASD Regulation the balance owed of \$1,500.00.

Fees are payable to the NASD Regulation, Inc.

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ARBITRATION PANEL

David Plimpton, Esq.

John F. Corbett

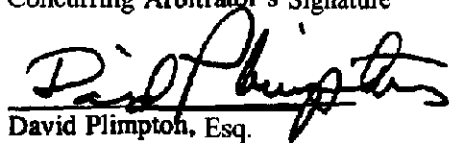
Stephen M. Acerro, Jr., Esq. -

Public Chairperson

Public Panelist

Industry Panelist

Concurring Arbitrator's Signature



David Plimpton, Esq.

Date of Decision: November 19, 1996

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ARBITRATION PANEL

David Plimpton, Esq.

Public Chairperson

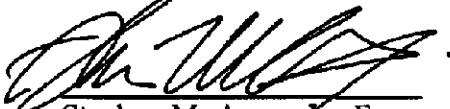
John F. Corbett

Public Panelist

Stephen M. Acerra, Jr., Esq. -

Industry Panelist

Concurring Arbitrator's Signature


Stephen M. Acerra, Jr., Esq.

Date of Decision: November 19, 1996

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ARBITRATION PANEL

David Plimpton, Esq.	-	Public Chairperson
John F. Corbett	-	Public Panelist
Stephen M. Acerra, Jr., Esq.	-	Industry Panelist

Concurring Arbitrator's Signature


John F. Corbett

Date of Decision: November 19, 1996